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No. 15,841

IN THE

United States Court of Appeals

For the Ninth Circuit

JOGINDAR SINGH CLAIR,
Appellant,

vs.

BRUCE G. BARBER, as District Director, Immigration and Naturalization Service, San Francisco District,
Appellee.

BRIEF FOR APPELLANT.

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JURISDICTIONAL STATEMENT.

This appeal is from a judgment (T. 27) of the United States District Court for the Northern District of California, Southern Division, in an action for judicial review of an order of deportation. The action was brought under Section 10 of the Administrative Procedure Act (5 U.S.C. 1009) and under the Declaratory Judgment Act (28 U.S.C. 2201), and jurisdiction of the Court below was predicated upon those sections and upon 8 U.S.C. 1329. Jurisdiction to review the judgment of the Court below is conferred upon this Court by 28 U.S.C. 1291.

STATEMENT OF THE CASE.

The facts are not in dispute. Appellant, a citizen of India, came to the United States as a seaman on August 27, 1940, aboard a vessel of British registry, and has remained continuously in the United States since that time. On February 1, 1955, he was served with a warrant of arrest in deportation proceedings (T. 9). Subsequently in those proceedings, he applied for suspension of deportation under 8 U.S.C. 1254(a)(1). His application for suspension of deportation was denied by the Special Inquiry Officer who ordered that appellant be deported if he failed to depart voluntarily from the United States (T. 9-14). On appeal, the Board of Immigration Appeals affirmed the denial of suspension of deportation for the stated reason that appellant "came into the United States on an allied merchant vessel during the war, left his ship and did not engage in seaman service during the remainder of hostilities" (T. 15).

STATUTORY PROVISIONS.

"(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who——

(1) applies to the Attorney General within five years after the effective date of this chapter for suspension of deportation; last entered the United States more than two years prior to June 27, 1952; is deportable under any law

of the United States and is not a member of a class of aliens whose deportation could not have been suspended by reason of section 19(d) of the Immigration Act of 1917, as amended; and has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence; * * *"

(Section 244(a)(1) *Immigration and Nationality Act of 1952*—8 U.S.C. 1254(a)(1)).

SPECIFICATION OF ERRORS.

The errors relied upon by appellant are:

1. The District Court erred in holding that the administrative denial of appellant's application for suspension of deportation was a valid exercise of the discretion contained in section 244 of the Immigration and Nationality Act (8 U.S.C. 1254).

2. The District Court erred in holding that appellant was afforded due process and a fair hearing on his application for suspension of deportation.

3. The District Court erred in holding that appellee and the Board of Immigration Appeals lawfully

exercised their discretion in denying appellant's application for suspension of deportation on the sole ground that appellant came into the United States on an allied merchant vessel during the war, left his ship, and did not engage in seaman service during the remainder of hostilities.

4. The District Court erred in entering judgment that the complaint and action be dismissed.

THE QUESTION PRESENTED.

The issue on this appeal may be reduced to one question, as follows:

> Can the Board of Immigration Appeals properly deny an application for suspension of deportation on the sole ground that the applicant came into the United States in 1940 "on an allied merchant vessel" and "did not engage in seaman service during the remainder of hostilities?"

ARGUMENT.

THE ADMINISTRATIVE DENIAL OF THE APPLICATION FOR SUSPENSION OF DEPORTATION IS ARBITRARY AND CAPRICIOUS AND CONSTITUTES AN ABUSE OF DISCRETION.

The clear tenor of the decided cases is that, while suspension of deportation is a discretionary matter, denial of such an application is reviewable by the Courts for abuse of discretion.

We believe that the decision of the Court of Appeals for the Second Circuit in *Mastrapasqua v.*

Shaughnessy, 180 F. 2d 999, is directly in point. In that case, suspension of deportation had been denied for the stated reason that the seaman had arrived in the United States in March 1941 on an Italian ship which had been interned, the Board of Immigration Appeals having decided that discretionary relief from deportation should not be granted to aliens whose presence in the United States was due to the war. In that case, the Court said:

> "There seems to be no more rationality in this classification than there would be in arbitrarily refusing to consider discretionary relief for all left-handed men or for all those whose names begin with the first thirteen letters of the alphabet. Consequently, we conclude that the classification is capricious."

The Court thereupon ordered the relator released from custody unless within a reasonable time the immigration authorities exercised their discretion without regard to the aforesaid consideration.

Similarly, in the case of

U. S. ex rel. Partheniades v. Shaughnessy, (D.C. N.Y.) 146 F.S. 772

the Court overturned an administrative decision denying suspension of deportation, pointing out that the discretionary power of the administrative authorities must not be exercised capriciously or arbitrarily, that it appeared that in denying the application the immigration authorities in that case had been "influenced by erroneous and extraneous facts" and that the denial of discretionary relief in that case had been based on "improper considerations".

In the recent case of *Application of Paktorovics* (D.C. N.Y.) 156 F.S. 813, 819, which involved the Attorney General's discretion to admit aliens into the United States under parole, the Court said:

> "Though the scope of judicial review of an act of discretion committed to the Attorney General is minimal, where the reasons provided are on their face capricious and arbitrary and do not involve considerations Congress intended to make relevant, the intervention of the courts is justified (citing cases)."

The Courts in other cases have frequently stated the rule to be that, although suspension of deportation is a matter of grace, denial of suspension of deportation is reviewable by the Courts where there has been abuse of discretion or arbitrary and capricious action.

U. S. ex rel. Matranga v. Mackey, 115 F.S. 45;

U. S. ex rel. Adel v. Shaughnessy, C.A. 2, 183 F. 2d 371, 372;

U. S. ex rel. Kaloudis v. Shaughnessy, C.A. 2, 180 F. 2d 489.

All these cases recognize that if an application for suspension of deportation has been denied on the basis of irrelevant reasons or arbitrary considerations, such action constitutes an abuse of discretion which is reviewable by the Courts. This is in accordance with the well-settled principle that arbitrary use of administrative authority is invalid *(U. S. ex rel. Knauff v. McGrath*, C.A. 2, 181 F. 2d 839).

> "Where the administrative authorities have applied against an individual or class a test not

based on any reasonable classification which would justify such discrimination, such action is arbitrary and capricious and must be set aside on judicial review."

Kraus v. Dulles, (C.A., D.C.) 235 F. 2d 840, 842.

To deny the privilege of suspension of deportation to aliens who happen to have arrived as seamen in 1940 on a so-called "allied" merchant vessel, while superficially possessing an appearance of reasonableness, is actually based on fanciful and irrelevant premises. There is no indication in the statute (8 U.S.C. 1254(a), supra) that it was contemplated that any distinction be made between aliens who arrived as seamen and aliens who arrived in any other manner, nor that any distinction be made between classes of seamen. The test is unreasonable since it would not bar a person who arrived as a stowaway, nor would it bar a seaman who came on a German ship or even on a vessel of a non-belligerant nation. Moreover, with regard to the asserted failure to perform service as a seaman during the remainder of hostilities, the record indicates that appellant registered under the Selective Service laws of the United States and thereby made himself available to perform whatever service the appropriate authorities might have demanded of him.

We submit, therefore, that upon analysis the proposition invoked by the Board of Immigration Appeals in denying discretionary relief involves a consideration wholly extraneous to the purpose of the suspen-

sion of deportation provision and wholly insupportable by any test of reasonableness. Where Congress has intended that aliens should be denied privileges under the Immigration and Nationality Act because of failure to perform military or other duties, it has specifically so privided in the statute (e.g. 8 U.S.C., Secs. 1101(a)(19), 1425, 1426, 1182(a)(22)). There is no indication in the statute that Congress contemplated that administrative officials should set up such an irrational distinction as to exclude from any of the discretionary benefits of the Act those who arrived on a merchant ship as crewmen if the ship flew the flag of a nation which later became an ally of the United States in World War II. By registering under Selective Service laws in the United States, appellant made himself available for any and all service which might be required of him by the competent authorities of the United States Government. For administrative authorities to speculate as to duties theretofore owed to a foreign country because of an individual's occupational status as a merchant seaman on a ship which flew the flag of that country would, in the words of the Court of Appeals for the Second Circuit in the *Mastrapasqua* case, supra, be no more rational than to deny relief to all left-handed men. As a matter of fact, there was probably more reason for an adverse decision in the *Mastrapasqua* case than in the case at bar, since *Mastrapasqua* was a merchant seaman of a country which shortly after his arrival became an enemy country. In any event, if the consideration invoked by the Board in the present case

be a valid basis for denying suspension of deportation, then the immigration authorities may devise almost any type of test, whether rationally relevant to the immigration function or not. The field for arbitrary classifications under any far-fetched theory or pseudo-principle—social, political or international—would be limitless. It is difficult to believe that in dealing with so grave a matter as deportation of an alien who has been in the United States for seventeen and one-half years, Congress intended to differentiate between otherwise equally deserving individuals on the basis of so tenuous, superficial, and far-fetched a consideration as has been applied in the case at bar.

As stated at the outset, it is undisputed that suspension of deportation is a discretionary matter, but administrative discretion may be reviewed for abuse, or where the denial is arbitrary or capricious. The situation involved in the case at bar and in the *Mastrapasqua* case, supra, is not distinctively different from cases in which the administrative decision has been set aside because the immigration authorities applied tests set forth in an inapplicable statute (Cf. *Barber v. Lal Singh*, (C.A. 9) 247 F. 2d 213). Here, as in the *Mastrapasqua* case, the immigration authorities seek to apply a test which has no rational relevance to the considerations prescribed by the applicable statute (8 U.S.C. 1254(a)(1). Their action is not sustainable on the theory that, by leaving his ship, appellant demonstrated a lack of sympathy for the cause of Britain which later became an ally of this country, for, as we have shown, appellant registered for service under the

Selective Service laws of this country and thereby placed himself in readiness to serve in accordance with any demand which this country might make upon him. The classification thus set up by the Board of Immigration Appeals is unreasonable, discriminatory, and unrealistic since it would not apply to non-seamen who may have come to this country during the period when their own country was engaged in World War II. In principle, the classification has no more rationality than that considered in the case of *Mastrapasqua v. Shaughnessy*, supra.

CONCLUSION.

The appellant has resided in the United States for seventeen and one-half years and is conceded to be a person of good moral character. In the determination of his application under the immigration statute for the privilege of suspension of deportation, we submit that he is entitled to have the application considered on its merits on considerations germane to the statutory purposes and that denial of his application for the reasons stated in the decision of the Board of Immigration Appeals constitutes unreasonable, arbitrary and capricious action and abuse of discretion. In accordance with the procedures followed in the case of *Mastrapasqua v. Shaughnessy*, supra, we submit that the immigration authorities should be required to exercise the statutory discretion to grant or deny suspension of deportation without regard to

the considerations upon which the Board of Immigration Appeals has heretofore rejected that application.

It is therefore submitted that the judgment of the Court below should be reversed.

Dated, San Francisco, California,
March 4, 1958.

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(Appendix Follows.)

Appendix.

Appendix

EXHIBIT INTRODUCED INTO EVIDENCE.

Transcript Pages 17-18—Case submitted by the District Court on the certified record of the administrative proceedings of the Immigration and Naturalization Service.